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NO. 22221

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

EDWARD ELLSWORTH WILSON,

Appellee.

3468

V. 3465

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APPELLANT'S OPENING BRIEF

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

San Francisco Law Library

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FILED

DEC 12 1967

WM. B. LUCK, CLERK



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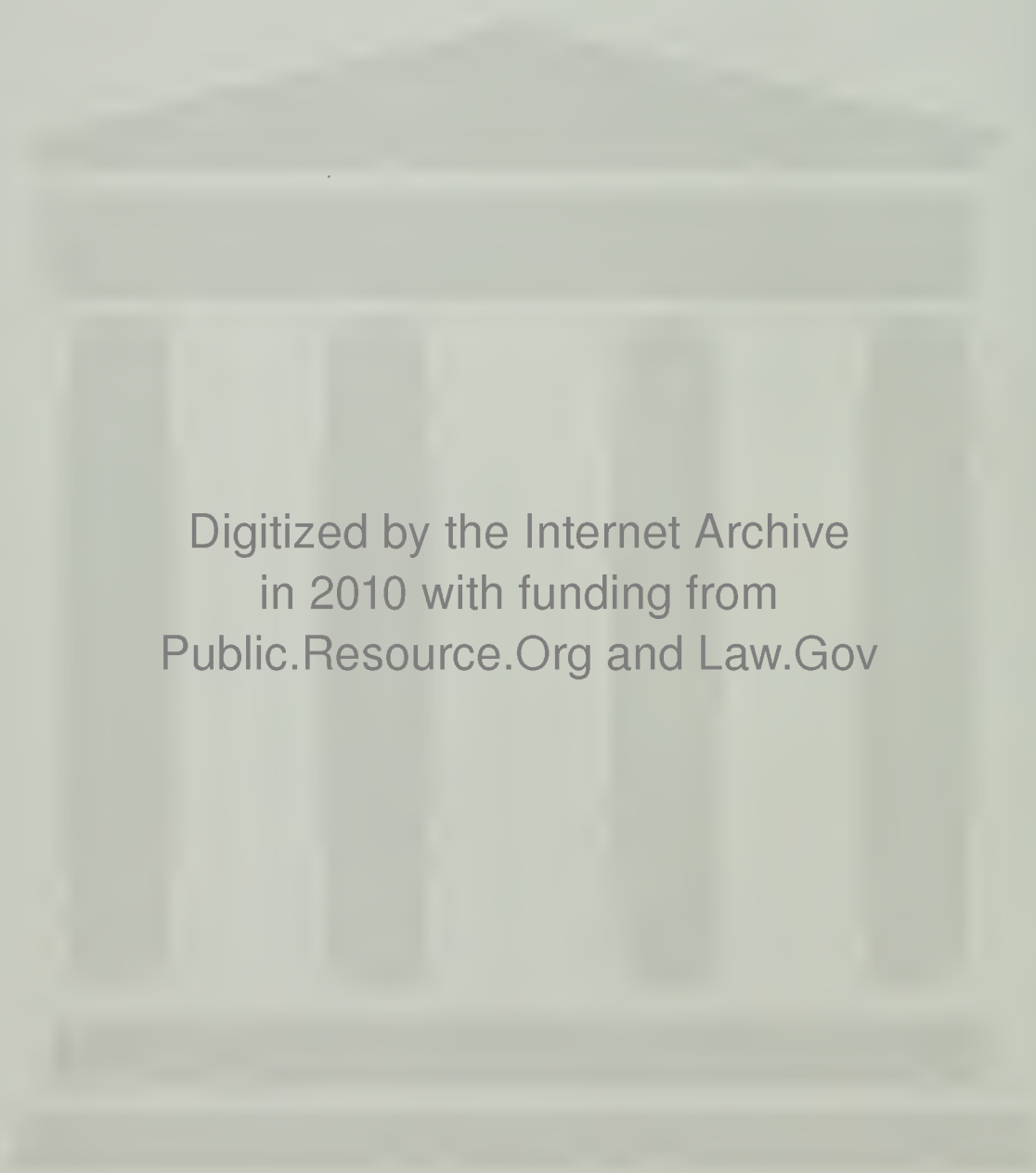
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APPELLANT'S OPENING BRIEF

I.

STATEMENT OF THE PLEADINGS AND FACTS DISCLOSING  
JURISDICTION.

On June 7, 1967, the federal grand jury for the Southern District of California returned a two-count indictment (No. 1198-SD) charging appellee Edward Ellsworth Wilson and Jeffrey Norman Herwitz in Count One with a violation of Title 21, United States Code, Section 176 (a), namely illegal importation of marihuana. In Count Two appellee Edward Ellsworth Wilson and Jeffrey Norman Herwitz were charged with a violation of Title 21, United States Code, Section 176(a), namely concealment and transportation of illegal imported marihuana. Transcript of Record, pp. 1-2.

On June 19, 1967 appellee Edward Ellsworth Wilson entered a plea of not guilty to both counts of the indictment. Id. at 3. On June 28, 1967,



appellee made a motion to suppress evidence and statements. Id. at 4. On July 26-27, evidence was taken in connection with the motion to suppress. Id. at 18-20. On August 3, 1967, the Honorable Fred Kunzel granted the motion to suppress, and filed a written order to that effect. Id. at 21-25.

On August 8, 1967 appellant filed a timely Notice of Appeal and a Certificate of Appeal Not for Purposes of Delay. Id. at 26-28. On August 30, 1967 appellant filed the Designation of Record on Appeal. Id. at 29. On October 17, 1967 appellant filed the Statement of Points. Id. at 33.

The offenses occurred in the Southern District of California, and jurisdiction of the District Court was based on Title 21, United States Code, Section 176(a) and Title 18, United States Code, Section 3231. The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based on Title 18, United States Code, Section 1404, and Title 28, United States Code, Section 1294.

## II.

### STATUTES INVOLVED

Title 21, United States Code, Section 176(a) reads in pertinent part as follows:

"Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or



sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than five or more than twenty years, and in addition, may be fined not more than \$20,000 . . . ."

Title 18, United States Code, Section 1404 reads in pertinent part as follows:

"In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion for the return of seized property and to suppress evidence made before the trial of a person charged with a violation of . . . (2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, . . . ."

"This section shall not apply with respect to any such motion unless the United States attorney shall certify, to the judge granting such motion, that the appeal is not taken for purposes of delay. Any appeal under this section shall be taken within 30 days after the date the order was entered and shall be diligently prosecuted."

Section 2(c) of the Narcotic Drugs Import and Export Act is Title 21 U.S.C. Section 174. Section 2(h) is 21 U.S.C. Section 176(a). Section 2(i) is 21 U.S.C. Section 176(b). Narcotic Control Act of 1956, Pub. L. No. 728, ch. 629, Title 1, §§105, 106, 107, 70 Stat. 570-71.



### III.

#### STATEMENT OF THE CASE

##### A. Questions Presented

1. Did the District Court err in granting the motion to suppress the one hundred pounds of marihuana?

2. Did the District Court err in granting the motion to suppress the statements made by the defendant prior to his being taken before the United States Commissioner?

##### B. Statement of the Facts

On Sunday, May 14, 1967, Mother's Day, at approximately 1:00 p.m., defendant arrived at the air freight office of United Airlines at the San Diego International Airport, Reporter's Transcript, pp. 2, 29 [hereinafter abbreviated as R.T.]. On duty for the airline at that time were Mitchell Goss and Charles Dowling. Id. at 2, 28. Defendant drove up to the air freight office in a red Plymouth Valiant, which he parked diagonally in front of the building instead of within the parking stalls. Id. at 29. This unusual method of parking placed defendant's vehicle close to the scale. Id. at 4. Defendant opened the trunk of his vehicle and told Dowling that he had a couple of cases of personal effects that he desired to send to New York. Dowling assisted him in removing the items from the trunk, and then weighed the cartons. Id. at 29.

The two items in question were cardboard cartons, approximately three feet long, a foot high, and a foot and a half in width. Id. at 7, 30. A



combination lock had punched its way through the cardboard, and a footlocker was visible within. Id. at 29. The flaps of the cartons were sealed down with regular gum paper or tape. Id. at 7, 30. Moreover, there was a rope around each of the cartons. Id. at 30.

Defendant and Dowling went inside the freight office, and relayed the information as to the weight of the cartons to Goss. Id. at 29. Defendant indicated to Dowling that the cartons contained personal effects, and he told Goss that they contained wearing apparel. Id. at 29, 3. Goss made out the air waybill. Id. at 3, 6. Defendant gave his identity as Mr. J. Johnson, 1214 Thomas Street, San Diego, California, and paid the \$29.69 charge for the air freight with a fifty dollar bill. Id. at 6. The total weight of the two cartons was one hundred thirty-six pounds. Id.

Goss became suspicious of defendant prior to defendant's departure from his office, id. at 4, although there was nothing unusual about the defendant's demeanor or appearance. Id. Part of Goss' suspicious attitude arose from the nature of the cargo that defendant was shipping. Id. The previous day, May 13, 1967, at about 6:00 a.m., when Goss arrived at work, he had received a long distance telephone call from one of his supervisors in Los Angeles. Id. at 4-5. The phone call alerted Goss to the fact that he had signed an air waybill for a shipment of footlockers containing marihuana. Id. at 5. He was informed that marihuana was being shipped in new footlockers with cheap padlocks or combination locks on them, id., and green or blue in color. Id. Goss was also told to be on the lookout for such shipments, and to call law enforcement agents for any assistance that he could get. Id. at



9-10. Finally, Goss was informed that the Los Angeles department had found marihuana in such footlockers on four separate occasions within the last week. Id. at 11-12. After receipt of this phone call, Goss called the San Diego Police Department on Saturday, May 13, 1967 and inquired of them as to their knowledge of such activities. Id. at 12. The police gave no specific directions on any procedure to follow if he received any more such shipments, but merely informed him that Goss should give the police a call in case he needed help or such on contraband material. Id.

Goss was also suspicious of defendant because of the manner in which the defendant parked his vehicle at the air freight office. Id. at 4.

Upon defendant's departure from the air freight office, Goss looked out of the door and secured the license number of the car, although he did not notice the make or color of the vehicle. Id. at 20. His main concern at that moment was to get the license plate number. Id.

After defendant had departed the premises, Goss asked Dowling to bring in one of the cartons. Id. at 5. Dowling took one inside and in the presence of Goss cut the rope off, split the label sealing the flaps down, and turned the carton upside down. Id. at 31, 32. Inside this carton was discovered a footlocker, id. at 5, 31, either green (id. at 31) or blue (id. at 8) in color.

When Goss asked Dowling to bring a carton inside the office, Dowling had remarked that the cartons were about the size of footlockers. Id. at 30. At that time, Dowling's mind centered upon the information he had received that day or the day before with regard to new footlockers. Id. at 31. He had been informed that a couple of days prior a shipment of two footlockers



containing marihuana had originated in San Diego. Id. He was told to keep his eyes open for such footlockers. Id. The identifying elements of such shipments involved the use of new footlockers with a lock. Id. at 31-32.

The footlocker discovered inside the carton was a brand new one, with a combination lock. Id. at 8. After discovering the footlocker, the other carton was brought into the office. Id. at 6, 31.

At this time, Goss and Dowling engaged in efforts to open the footlockers. Both Goss and Dowling had tried to pull the footlockers open. Id. at 32. Goss took the serial number off the back of the combination locks, and tried to see if those figures corresponded with the proper combination that would be able to open the locks. Id. at 9. Goss tried other combinations, including one that he had on an old lock of his own. Id. at 9. In addition to these actual attempts to open the footlockers, Dowling gave consideration to turning the footlocker on its side, and hitting the hinge pins out with a nail. Id. at 33.

All of the efforts and intentions to open the footlockers occurred prior to Goss' contacting any law enforcement agency. Id. at 9. Prior to the telephone call to the San Diego Police with regard to the footlockers, Dowling had formed an intention to open the footlockers "one way or other . . . ." Id. at 33-34. Goss also had definitely decided to open the footlockers before he called the law enforcement agents. Id. at 9.

Failing in their efforts to open the locks with various combinations, Goss then telephoned his supervisor, the supervisor of Customer Service in San Diego, and informed him that he felt that they had found a "case." Id. at



10. Goss apparently obtained authorization from his supervisor to open the footlockers, id. at 13, and permission to call the police department. Id. at 10. Goss then telephoned the San Diego Police Department. Id. at 10, 35. His purpose in calling the police was partially motivated by the desire to have the police present to identify any contraband that might be found. Id. at 10. Another reason was to request assistance from the police in opening the footlockers. Id. Neither Goss nor Dowling had ever seen marihuana before, and would not have been able to identify it if it was in fact discovered inside the footlockers. Id. at 19, 35.

When Goss telephoned the San Diego Police Department, he indicated that he was of the opinion that he had found contraband in a shipment. Id. at 12-13. He knew that the police department might have availability to the combinations which would operate to open the locks, and he requested the assistance of the police in this regard. Id. at 13. If such combination were not provided, Goss gave consideration to filing the locks off or breaking them off. Id. He indicated that the footlockers contained in the previously opened cartons were of the same type that had been found to contain marihuana in Los Angeles most recently. Id. at 44-45. Goss relayed the fact that defendant had parked his vehicle in an unusual manner, he advised the police of the license number of defendant's car, and he described the defendant and his car, id. at 44-45, and the name used by defendant. Id. at 49. (It should be noted that Goss and Dowling agree that Goss made the call, id. at 12, 34, although Mr. Ritchie, who received the call for the San Diego Police Department, was not sure which of these two United Airline employees had phoned. Id. at 46.)



Goss indicated that consideration was being given to knocking the hinge pins, but Ritchie advised against opening the footlockers by damaging them. Id. at 46, 52. Ritchie said that he knew a locksmith who could open the lockers without damaging them. Id. He was going to attempt to get combinations to the locks, and give them to United Airlines so that the footlockers could be opened that way. Id. Goss indicated to Ritchie his intention to open the lockers. Id. at 47, see also id. at 13. Goss told Ritchie that the footlockers were going to be retained at the airport, and not be shipped out. Id. at 16, 47. Ritchie did not give Goss any directives with regard to retention of the footlockers. Id. at 47.

The cartons would have been shipped out at 2:00 p.m. on a flight to New York on the day in question. Id. at 15, 27-28. Another flight was scheduled to depart for New York at 2:50 p.m., and another at 9:45 p.m. Id. at 15.

Goss then departed the air freight office prior to the arrival of the police. Id. at 16. He told Dowling to permit the police to open the footlockers if they were able to do so with the combinations they might provide. Id. at 17. Had the police been unable to assist in their opening, Dowling was going to open them by knocking the pins out of the hinges. Id. at 36.

Goss subsequently returned to the air freight office at about 3:30 p.m. Id. at 17. There is some question whether the police were present when Goss returned or whether he preceded their arrival. Compare id. at 18, 55, 58 with id. at 49-50.

During the time that Goss was absent from the air freight office, Ritchie was busy. He called Sergeant Schroers of the San Diego Police Department,



who is also a part-time locksmith. Id. at 48. Schroers told Ritchie that the combination could be discovered if the brand name of the locks and the serial numbers from the rear of the locks were supplied. Id. Ritchie then called Dowling and obtained that information, id., and in turn, relayed it to Schroers. Id. Schroers then supplied Ritchie with the combinations. Id. Ritchie's purpose in securing the combinations to the locks was to give them to United Airlines so that United Airlines could open the footlockers. Id. at 46.

Ritchie then contacted the California Highway Patrol and discovered that the registered owner of the vehicle, the license number of which was given to him by Goss, was a Rebecca J. Bellknap, 3333 Bayside Walk, San Diego, California. Id. at 48. Ritchie then contacted the supervising agent of the State Bureau of Narcotics, and another city narcotics officer. Id. at 49. The Federal Bureau of Narcotics was also contacted. Id.

Ritchie, Agent Charles T. McLaughlin of the State Bureau of Narcotics, and Detective Albert N. Myrann of the San Diego Police Department Narcotics Detail - - these parties met at Ritchie's office at 2:00 p.m., and proceeded to the air freight office of United Airlines. Id. at 49, 55, 58.

After arrival there, these three individuals looked at the footlockers and determined that they were brand new and of the same type that had been discussed on the prior day in the conversation between Ritchie and Goss. Id. at 50. At this time McLaughlin depressed the ends of one of the footlockers so that air, and its odor, would be emitted from it. Id. at 55, 59-60. The odor of marihuana was detected as a result of this depression. Id.

The combinations were supplied to Goss at that time, and he attempted



to use the combination to open one of the footlockers, but was unable to do so because he did not have his glasses on. Id. at 18, 37, 50-51, 56, 60-61. Myrann opened one of the footlockers, and Ritchie opened the other after Goss made his attempt. Id. at 18-19, 51, 55-56, 60-61. The marihuana in issue in this appeal was inside the footlockers. Id. at 19, 61.

Goss and Dowling were acting pursuant to the regulations which permit the airlines to inspect baggage. Id. at 19, 38.

On Monday, May 15, 1967, a warrant was obtained for the arrest of defendant from the United States Commissioner. Commissioner's Docket No. 13, Case No. 4431. On Tuesday, May 16, 1967 defendant was arrested near the 3300 block of Midway Drive, San Diego, California at approximately 11:15 a.m. by McLaughlin and Agent Joe Baca of the Federal Bureau of Narcotics. R.T. p. 63. Defendant was advised that he was under arrest as per a federal warrant charging him with a federal violation, and was then advised of his constitutional rights. Id. He was advised that he had a right to remain silent, he was entitled to an attorney, that anything he said at that time could and would be used against him in a court of law, and that if he could not afford an attorney, an attorney would be appointed to represent him prior to any questioning. Id. at 64. After defendant was taken to his residence, id. at 65, he was taken to the office of the Federal Bureau of Narcotics, 325 West "F" Street, San Diego, California. Id. at 66. At approximately 12:15 p.m. defendant was escorted through the front door of 325 West "F" Street, easterly in the hallway, and up three flights of stairs to the Federal Bureau of Narcotics office. Id. at 66-67. Defendant was taken to this office for the purpose of



finger-printing and processing id. at 68, and for questioning. Id. Prior to any interview with defendant, defendant was again admonished of his constitutional rights by McLaughlin in the same manner that he had previously been advised. Id. at 69. At this time defendant made numerous admissions of guilt and incriminating statements. Id. at 71-72. Defendant was arraigned before the United States Commissioner, Edward Harris, no later than 3:00 p.m. that same day, id. at 67-68, 83, and sometime after 2:00 p.m., id. at 79. The total time spent in the office of the Federal Bureau of Narcotics was over one hour. Id. at 74, 80.

On the way to the office of the Federal Bureau of Narcotics, McLaughlin, Baca and defendant passed by the office of the United States Commissioner, which office is located at the base of the stairs from the first floor at the eastern end of the building at 325 West "F" Street. Id. at 84. McLaughlin does not recall passing by the United States Commissioner's office, nor seeing him in the building prior to taking defendant before him for arraignment. Id. at 67.

The United States Commissioner was in the building from the morning hours until the arraignment of defendant, specifically making himself available for that arraignment. Id. at 83. However, he does not specifically recall whether or not he was in his office when defendant was brought into the building and past his office. Id. at 86.



## IV

### ARGUMENT

A. THE DISTRICT COURT ERRED IN GRANTING THE MOTION TO SUPPRESS THE ONE HUNDRED POUNDS OF MARIHUANA AS EVIDENCE.

1. There was probable cause to conduct the search in question, and a search warrant was not required.

For the search in the present case to be valid, two factors must be found to exist: (1) probable cause for the search even if a warrant was unnecessary, Henry v. United States, 361 U.S. 98, 104 (1959), and (2) the absence of necessity for a warrant due to the "exceptional circumstances" in this case, naemly the contraband was threatened with imminent removal or destruction. United States v. Ventresca, 380 U.S. 102, 106-07 (1965); Cipres v. United States, 343 F.2d 95, 98 n.9 (9th Cir. 1965).

The lower court in this case made no specific findings on the issue of whether or not probable cause existed for the search, or whether or not a warrant was required under the circumstances. Order Granting Motion to Suppress One Hundred Pounds of Marihuana as Evidence, and To Suppress Statements Made by Defendant After Arrest [hereinafter referred to as Order]. The lower court did impliedly find that a warrant was necessary when it noted that the officers did not have a search warrant when the search in question was made. Id. at 2. This fact coupled with the finding that the search was a governmental search, as distinct from a search by private parties, suggests



that a warrant was required. Moreover, the lower court seemed to have found that there were no circumstances suggesting that the contraband in question would have been subject to removal, as it noted that instructions were "that the footlockers were not to be shipped, . . . ." Id.

Assuming that the search was made by governmental agents, was there probable cause for the making of the search? There can be no other answer to this question but an affirmative one. First, the starting point is the minds of the governmental agents when the search was made. What did they know when the search was made? In this regard, it must be conceded that a governmental search of defendant's footlockers occurred when McLaughlin depressed the lid of one of the lockers and detected the odor of marihuana. R.T., pp. 55, 59-60; Order, p. 2; Hernandez v. United States, 353 F.2d 624, 626 (9th Cir. 1965).

Prior to the time that the lid of one of the footlockers was depressed, Ritchie had received a phone call from Goss relating to a couple of cartons that were presented for shipment at the air freight office of United Airlines. R.T., pp. 10, 35. Goss had observed the unusual manner in which defendant parked at the office, although he did not detect anything unusual about the demeanor of defendant. Id. at 4. However, Goss had been alerted to a pattern of marihuana shipments just the day before. Id. at 4, 5, 9-10, 11-12. This pattern involved the use of new footlockers with locks on them, of a weight of approximately one hundred thirty pounds. Id. In fact, Goss had been subjected to the embarrassment of authorizing shipments of marihuana in a similar manner just a few days before the incident in question, and had been so advised just one day before the incident when his supervisor called to



inquire as to who authorized such a shipment. Id. at 5. Moreover, Goss was aware that four such shipments had occurred within the last week in Los Angeles. Id. at 11-12. Thus the circumstances with regard to the shipment gave rise to Goss' suspicion, as the lower court so found. Order, p. 1.

It does not suffice to state baldly that the police knew only what Goss knew with regard to the footlockers. Ritchie knew one more very important item: He knew that Goss was highly suspicious of the cartons. Goss told Ritchie that attempts had been made to open the footlockers, and that Goss was now seeking the assistance of the police in opening them. R.T., pp. 12, 13, 47. Goss' concern over his discovery was further exemplified by the fact that Goss told Ritchie that he was not going to permit the footlockers to be shipped out, and that it was his intention to open them. Id. at 16, 47. Goss furthermore told Ritchie of the unusual manner in which defendant had parked, and that he had used the name of J. Johnson on the air bill. Id. at 44-45, 49. Finally, and most importantly, Goss gave Ritchie the license number of defendant's vehicle, which he had taken great efforts to secure. Id. at 44-45.

Ritchie also had been contacted the previous day by Goss and the subject of marihuana being shipped in this manner had arisen. Id. at 12. Goss had been asked on that occasion to notify the police if he was in need of any assistance in such matters. Id. Now Goss was so notifying the police on the day in question. To this point this present case strongly resembles the factual situation in Hernandez v. United States, supra. There a recurring pattern had been discerned with regard to the shipment of marihuana at an



airport. In Hernandez, the police had requested airline employees to notify them if a person fitting the pattern appeared, which was done. In Hernandez, probable cause was found to exist, and justified the search. Hernandez v. United States, supra at 627-28.

It should be noted that, in Hernandez, there were several factors contributing to the pattern of marihuana shipments. These included Latin-American couriers, traveling first class on non-stop flights without advance reservations. Their luggage was generally new and expensive, with combination locks, and very heavy. Cash of large denominations was used to pay the fares and weight overcharges. Eight such cases had occurred within the last two years. Hernandez v. United States, supra at 626. Admittedly, the case before the bar has just a few less numerous factors as does Hernandez. However, it does have the very important distinction of there being four similar cases within the last week, as opposed to eight similar cases over a two-year period in Hernandez. This fact goes straight to the main point in Hernandez - - was there a pattern which justified the search? In Hernandez, the greater number of contributing factors was diluted by the less frequent occurrences. In spite of this dilution, the pattern was sufficiently established. Appellant fell within the pattern and the search was justified.

In the instant case, the most recent frequency of similar cases takes up any slack left by a fewer number of contributing factors, and establishes the "method of operation," in which defendant was discovered, to validate the search from a "probable cause" standpoint.

In our case, these factors retained their identical aspect with prior



shipments of marihuana: (1) the size of the cartons to be shipped, specifically their similarity to new footlockers in size, (2) the weight of the cartons, being about the same, namely one hundred thirty pounds, (3) the age of the footlockers (generally new), (4) the color of the footlockers, either blue or green, and (5) the presence of padlocks or combination locks on the footlockers. R.T. pp 4-5.

In addition to the fact that the pattern in the present case is as firmly established as the one in Hernandez, the instant factual situation is stronger. There, the governmental law enforcement agency knew only what the airline employee knew, namely the similar factual situation. In this case, Ritchie knew more - - he knew that a responsible citizen was highly suspicious and extremely concerned over the possibility of contraband in the shipment. R.T. pp. 12-13, 13, 44-45, 46. Ritchie knew that Goss had tried to open the footlockers, that he intended to open them, that he was not going to ship them out, and that he had taken the license number of defendant's car as well as relayed the name defendant had used. Id. With this additional information, the question is squarely put: If probable cause does not exist at this point, how should a responsible, diligent law enforcement agent act under such circumstances? Is he to disregard and fail to act upon the information showing that an individual fits into a known pattern of criminal conduct and information indicating that a citizen with a known position of responsibility is highly suspicious of the individual's actions? It insults practical reasoning to suggest that Ritchie was not justified in carrying on the investigation in the manner in which he did. The ultimate result was an extremely reasonable



search, the mere squeezing of the footlockers to see if the odor of marihuana was present. Id. at 55, 59-60. In light of the information received, such a search was reasonable and warranted. It is a far cry from a search that might involve damaging the individual's property, and thoroughly searching the item in question. In fact, Ritchie advised specifically against damaging defendant's private property. Id. at 46, 52. This attitude is consistent with the police's constant vigilance to protect private property. There was probable cause for the type of search eventually made.

However, it should be noted that the path from facts known to the justification for the search, as well as for the type of search made, is not a path to be traveled in a leap-frog manner. It is too easy to jump from a seemingly insignificant fact, which in itself does not give rise to probable cause or reasonableness, to the search and conclude that the fourth amendment has been violated. Instead, one must view the entire sequence of events, and take into consideration their cumulative effect after analysis to determine whether or not probable cause existed to justify the search. Such a path was approved in Hernandez, supra at 627, and should be followed here.

Ritchie had discovered that the license number of the vehicle revealed a registered owner's name and address quite different from that given by the shipper. R.T. p. 48. This additionally discovered inconsistency must not go unnoticed in determining the reasonableness of the state of mind with which the law enforcement agents acted.

Assuming that probable cause did exist for the search, a search warrant was not required if "exceptional circumstances," namely that the contraband



was threatened with imminent removal or destruction, were present. United States v. Ventresca, supra. Appellant contends that such circumstances were present in this case. Goss testified that he had formed an intention to open the footlockers, and thus not allow them to be shipped. R.T. p 15-16. He left instructions to this effect with Dowling. Id. at 17. Finally, he communicated his intention to the police upon his call to Ritchie on the day in question. Id. at 16, 47. Thus it might be argued that the failure to obtain a search warrant was unjustified in view of the complete absence of any showing that there was any possibility that the footlockers were going to be shipped out.

Such an argument again would not take into consideration the practical problems faced by the police at that moment. It is known that the footlockers could have been shipped out at 2:00 p.m., 2:50 p.m. or 9:45 p.m. Id. at 15, 27-28. Moreover, it is known that neither Goss nor Dowling had ever seen marihuana previously, and would not have been able to identify any discovered vegetable matter as contraband. Id. at 19, 35. Thus the question arises: In spite of Goss' announced intention to retain the footlockers, can the police afford to rely upon that representation? Could Ritchie assume that Goss would in fact keep the footlockers there at the airport?

It should be borne in mind that the only parties who were in a position to exercise any control over the footlockers were the airline employees, and not the police. The governmental agent gave no specific directives to Goss with regard to retention of the footlockers. Id. at 47. How would Ritchie



be certain that Goss might not open the footlockers, discover the marihuana, and ship it on, not realizing what was the nature of the discovered matter? Could Ritchie be sure that Goss might not decide that he was acting overly suspicious, and merely ship the cartons out without further investigation, abandoning his previously disclosed desire to open them? Was it known that the party who originally phoned might not go off duty, as in fact Goss did, returning by sheer coincidence to retrieve some forgotten flowers for his mother on her special day, id. at 17, and that the new person in charge might not have sufficient knowledge of the circumstances surrounding the footlockers to make the intelligent decision to retain them there at the airport? Could it have been known that someone might not accidentally ship the cartons on to their destination?

With the perplexities of such probabilities in mind, it is hardly surprising and completely understandable why Ritchie wasted no time in gathering together individuals who might assist in identifying contraband (if any was found), and journeying quickly to the airport. Id. at 49, 55, 58. A search warrant was not required under the circumstances. Moreover, it should be noted that the day in question was a Sunday, and Mother's Day also, id. at 2, 29, and there is no indication that a person able to issue a warrant was available.

2. The search was a private one, not a governmental one.

Much of the argument supra is mostly academic, and presented merely to dramatize the practical problems faced by law enforcement officers.

If judicial hindsight is applied to declare their efforts to be



unconstitutional, law enforcement agents can accept such declarations if they are accompanied by suggested acceptable alternative courses of action. Probable cause is a factual, practical requirement, and should be measured to a large extent by the alternatives as faced by the agent in the field. If he did not act as he did, would he not have been considered to be negligent and not diligent in the performances of his duties? Objectively, would not the ordinary, reasonable member of public berate him for failing to act on the facts as he then knew them? If such a question is answered affirmatively, it goes a long way to establishing probable cause for the action taken. And, specifically, in the instant case, not to have acted under the circumstances that presented themselves would have been a dereliction of duty. Conversely, the facts disclosed probable cause and justification for the warrantless search.

However, the main point of reliance to sustain the search in question lies in the fact that the search was not a governmental one, bounded by the rules of probable cause and necessity for warrants, but was a private search by the airline, pursuant to its lawful authority. Put in another manner, the search was one more closely aligned to the decision in Gold v. United States, 378 F.2d 588 (9th Cir. 1967), and should be controlled by Gold, as distinct from Corngold v. United States, 367 F.2d 1 (9th Cir. 1966). It was this question to which the lower court directed its attention, and upon which it rendered its decision.

Appellant starts with the assertion that Gold clearly establishes the fact that governmental participation in a search by a private party does not



invalidate the search. In Gold, special agents of the Federal Bureau of Investigation advised the manager of United Airlines customer service that the agents had reason to believe that the description of the contents of the packages on the air waybill was inaccurate. This information was provided after surveillance of defendant Gold's trip to the air freight office at McCarran Field, Las Vegas, Nevada. Gold v. United States, supra at 590. The court admitted that there was a direct causal relationship between the participation of the federal agents and the opening of the packages by the airline:

"While it might be expected that the carrier would not ignore the packages after being advised of the mislabeling by government agents who obviously had more than a citizen's interest in the shipment, the carrier had sufficient reasons of its own for pursuing the investigation." Id. at 591.

Physical governmental participation is not fatal. That it can be is amply illustrated by the decision in Corngold v. United States, supra. Thus, the question becomes one, as in many other areas of law, of degree. There is a vast spectrum of governmental participation, ranging from the slightest degree of participation to the most serious. The line on this spectrum, distinguishing tainted governmental participation from valid participation, presently lies somewhere between Gold and Corngold. It is respectfully submitted that the case at bar is clearly on the safe side of Gold, and in no way approaches the objectionability of a Corngold case.

Before proceeding to an analysis of Gold and Corngold with this case, the problem language that the lower court found impassable should be



disposed of. The lower court cited language from Corngold to the effect that the search in Corngold would be objectionable even if the TWA employees had initiated and participated in the search. However, the opinion in Corngold continues in the very next sentence of the same paragraph in these words, "The customs agents joined actively in the search." Corngold v. United States, supra at 5. This qualifying phrase goes to the heart of the matter, namely the degree of governmental participation. In the facts of that case, it was the degree of governmental activity which was fatal, regardless of how the search was started. Although such language seemed to foreclose the matter in the view of the lower court, it is submitted that the language cannot be taken out of context of the factual situation. Whatever apparent forcefulness such language might have by itself is severely limited by, and unalterably linked to, the facts of the case.

Thus, instead of centering on what appellant believes to be a limiting choice of expression in Corngold, the appropriate emphasis should rest on the degree of governmental participation. In this regard, the factual situation presented by our case is closer to Gold than Corngold. First, in both Gold and Corngold, the search was casually initiated by some governmental activity. In Corngold the customs agents maintained surveillance on defendant and followed him to the airport. They then immediately tested the packages in question after defendant had arranged for shipping them. The opening of the packages was done specifically at the government's request. Corngold v. United States, supra at 2, 4, 5. In Gold it was only after the manager at the office received the information from government agents that any idea or



intention to open the packages came to his mind. Gold v. United States, supra at 591.

Quite to the contrary, in the instant case, non-governmental agents started the search. Goss and Dowling cut the rope off of the cartons, broke the gummed seal on the flaps, held the flaps down, and removed the footlockers. All this activity, which most certainly is a search in any legal sense of the term, took place prior to any contact with any governmental agency with regard to these packages. R.T. p. 9. Moreover, Goss and Dowling tried to open the footlockers by pulling on them. Id. at 32. Then Goss tried to solve the combination locks by utilizing the serial numbers on the backs of the locks, as well as an old combination he recalled from one of his own locks. Id. at 9. He formed an intention to open the footlockers before his call to the police. Id. In addition, Dowling also formed such an intention. Id. at 33-34. Consideration was given by both to alternate methods of opening of the packages, including filing the locks off, id. at 13, breaking the footlockers, and knocking the hinge pins out of the back of the locks. Id. at 33. All of this activity to open the footlockers came before any contact with the police. Then Goss called his supervisor to insure that his course of action was approved, and he obtained such approval. It was only then, pursuant to the direction given to Goss by his supervisor the day before, id. at 9-10, that a telephonic communication was made to the police to seek their assistance. Id. at 10, 35

Thus, it can hardly be argued that governmental action caused the initial efforts to open the footlockers. This fact makes the present case much



stronger than even Gold, and certainly distinguishable in this respect from Corngold. Moreover, it was this same factor which assisted the court in Gold to distinguish Corngold. In Gold, the court noted that the government agents left the premises and were not present when the manager and one other employee opened one of the packages. Gold v. United States, supra at 591. The same is true in the present case, as no governmental agents were present when the two employees opened the packages. (Interestingly enough, the employees in Gold and in this case were employees of United Airlines, whereas Corngold involved Trans World Airlines.) Finally, it was this factor that led the lower court to determine that this "factual distinction would seem to be sufficient to hold Corngold does not control, . . . ." Order, at 3. However, as noted supra, the lower court felt that it could not avoid the apparent significance of the language it cited from Corngold. Id. at 3-4.

Before discussing further the factual distinctions amongst these cases, it is well to note here that appellant is of the position that only one search occurred, which search resulted ultimately in the discovery of marihuana in the footlockers that defendant wanted to ship by air freight. It might be argued that the different activity by various persons should be considered separately for purposes of analysis. Such an attitude could result in the determination that several searches of the footlockers in question took place, instead of one continuous one. Appellant believes that such a position tends to distort the significance of the actions taken by the individual, either magnifying its significance or minimizing it. Ultimately, it is the degree and nature of the governmental participation which makes the crucial difference, and not the



number of searches.

It is beyond dispute that the initial investigation of the cartons sent by defendant, and their contents occurred as a result of the actions taken by private, non-governmental employees. It is not without significance that the action which they took prior to any governmental participation could very well have resulted in the discovery of the marihuana. They opened the cartons up. Had the defendant Wilson merely placed the marihuana inside the cartons, wrapped in plastic, without placing them inside footlockers with combination locks on them, the discovery would clearly have been purely a private one. It does not seem logical nor practical to make cases turn on the ingenuity that a defendant might use to seal his packages.

The presence of the footlockers and combination locks merely had the effect of carrying the private search further. It was at this point that governmental participation occurred. Appellant does not contend that law enforcement agents had nothing to do with the ultimate discovery of the marihuana, but contends that the role played by governmental agents was accessorial and not principal. Goss and Dowling had tried to solve the combination locks, and were unsuccessful. R.T. p. 9. They decided to call upon the police for two reasons: (1) to have assistance present to identify any contraband, if such were found, and (2) to have assistance in opening the locks through determination of the combinations by the police. The purpose of contacting the police was not to place the objective of opening the footlockers in their hands, but the purpose was to gain their assistance to aid the United Airline employees in their efforts to open the locks. See Id. at 9-10, 13. The



lower court made a finding explicitly supporting this crucial fact when it wrote that "from the evidence there is no question that the United Airline employees would have opened the lockers without any assistance from the police officers." Order, p. 3.

The fact that there is no question but that the employees were going to open the footlockers leads to another vital point: If this fact is true, and it has been communicated to the police, there was no necessity in the minds of the police that a warrant was necessary. The law enforcement officers knew that United Airlines was going to open the packages, and had in fact advised against damaging them to open them. R.T. pp. 46, 52. If the matter of opening the footlockers by United Airlines was a foregone conclusion in the minds of the officers, why should they give any consideration to obtaining a search warrant to do something which was going to be performed anyway?

Other points of distinction of the present case from Corngold, and similarity with Gold, include the following:

(1) In Corngold, as interpreted by Gold v. United States, supra at 591, the "airline employee had participated in the search solely to serve the purposes of the government and . . . the carrier had taken no action on its own behalf . . . ." In our case, the contrary is true. The carrier had taken action on its own behalf. The employees undertook the first stages of the search on their own, and never participated in it to serve the purposes of the government, but later merely requested governmental assistance.

(2) In Gold, "the agents did not request that the package be opened,



and they were not present when it was opened." Id. The same is true in the case before the bar. No request was made by the police to Goss or Dowling to open the footlockers, and no law enforcement agent was present when they removed from transit. It is true that agents were present when the footlockers were actually opened. However, it must be noted that it was Goss who first attempted to utilize the combinations supplied by the police to open the lockers. R.T. pp. 18, 37, 50-51, 56, 60-61. Unfortunately, due to his poor eyesight, and his inability to find his glasses, the actual opening of the locks, and then the footlockers was performed by law enforcement agents. Id. The critical point still remains imminently clear: The police were still assisting Goss, and only did the actual opening when Goss was unable to do so. This vital evidence continues to show the subservient role that the police were taking to private enterprise in the opening of the footlockers. In fact, as brought out in cross-examination, the depressing of the lid of one of the footlockers was demonstrated by McLaughlin to Goss as the means of determining whether or not marijuana might be contained therein. Id. at 23-24.

(3) In Gold, the court noted that the agents had the same right as any citizen to point out what they suspected to be a mislabeled shipping document, . . . ." Gold v. United States, supra at 591. In the instant case, the same could be said of the agents' right to supply the combinations to the locks.

(4) In Gold, it was noted that the agents "exercised no control over what followed." Id. In this case, the only control was exercised as a result of Goss' physical inability to carry out his intention. It was only after that inability became apparent did the agents participate.



(5) In Hernandez, one fact present was that airport employees had been asked to notify the police if a person fitting the aforescribed pattern appeared. Hernandez v. United States, supra at 626. In the case at bar the only request made by the police to Goss was that they be advised if he found anything. R.T. p. 12. In Hernandez, this factor did not operate to invalidate the search there.

(6) In Corngold, the initial opening of the packages was done specifically at the request of the government. Corngold v. United States, supra at 4. It is quite contrary in the present case.

(7) Finally, in Corngold after the initial opening, all activity was conducted by government agents. Corngold v. United States, supra at 4. In the present case, it was still Goss who first attempted to open the combination locks after the combinations had been supplied. R.T. pp 18, 39, 50-51, 56, 60-61. It can hardly be said that the search was then dominated and controlled solely by the governmental agents.

Appellant finds impressive similarity between the facts in the instant case and those disclosed by Collozo v. United States, 370 F.2d 316 (9th Cir. 1966), decided after Corngold. In Collozo, there is an indication that the United Airline's employee called first his supervisor, and then the Los Angeles Police Department. The circumstances causing this employee to take the same course of action that Goss did in the present case are not disclosed, but it suffices to say that something aroused his suspicion. The Los Angeles police officer detected an odor of marihuana (as did McLaughlin in the instant case), and called narcotics officers. Defendant Rodriguez was then arrested, and the



bag was found to contain a large quantity of marihuana. Id. at 317. The court ruled that the assignment of error as to the admissibility of the marihuana was without merit for the failure to raise the issue below. Id. However, it added that "we have, . . . under quite comparable circumstances, upheld a similar search. See Hernandez v. United States, 9 Cir. , 1965, 353 F.2d 624; compare Corngold v. United States, 9 Cir. , 1966, 367 F.2d 1." Id.

Because Corngold is a fourth amendment problem, it is submitted that Collozo is on point with the factual situation in the instant case, as disclosed to the fullest extent by the factual situation in that case. The matter of probable cause and the necessity of a warrant went without discussion where the search was so clearly a private one, with the role of the governmental law enforcement agents being one merely of assisting, not participating principally.

Finally, it should be noted that the lower court granted the motion to suppress and ordered the same "with extreme reluctance." Order, p. 4.

B. THE DISTRICT COURT ERRED IN GRANTING THE MOTION TO SUPPRESS STATEMENTS MADE BY DEFENDANT BECAUSE OF AN ALLEGED "UNNECESSARY DELAY," UNDER RULE 5, FEDERAL RULES OF CRIMINAL PROCEDURE, IN TAKING DEFENDANT BEFORE THE UNITED STATES COMMISSIONER BECAUSE THE REQUIREMENTS OF MIRANDA V. ARIZONA HAVE ALTERED THE MEANING OF "UNNECESSARY DELAY" IN SUCH A MANNER THAT RULE 5 WAS NOT VIOLATED IN THIS FACTUAL SITUATION.



The lower court cited the case of Morales v. United States, 344 F.2d 846 (9th Cir. 1965) as authority for the suppression of the highly incriminating statements by defendant. Appellant concedes that the facts of Morales appear to parallel exactly the facts of the present case. Thus, on the surface it would appear that appellant must accept the suppression of the statements by defendant in which he admitted his guilt.

However, appellant also accepts the lucid and perceptive analysis by the court in Morales with respect to the motivating rationale behind the exclusion of statements made during a period of "unnecessary delay." Upon adoption of the reasoning of the court in Morales on this issue, it becomes quite clear that the later decision by the United States Supreme Court in Miranda v. Arizona, 386 U.S. 436 (1966), has undermined the rationale of the rule announced by Morales, and requires reconsideration of that rule in light of the Miranda decision.

Morales contains no evidence whatsoever that defendant there was given any advice with regard to his constitutional rights prior to the time that he rendered the incriminating statements. In the case at bar, defendant was twice warned of his constitutional rights in a most complete manner. R.T. pp. 64, 69. In fact, the adequacy of the warning so impressed the lower court that the lower court complimented McLaughlin on his admonishment to defendant. Id. at 77.

Morales points out that Mallory v. United States, 354 U.S. 449 (1957), at 454-55 explains that the arraignment before a judicial officer is required so that a defendant may be advised of his rights. Thus, the McNabb-Mallory



rule aims to exclude statements made by a defendant who is unaware of his constitutional rights and who is being interrogated in a custodial situation. In neither McNabb v. United States, 318 U.S. 332 (1943), nor Mallory was the defendant advised of his rights prior to the making of the incriminating statements. It is the pressure on the unknowing defendant which makes his statements unreliable, and thus inadmissible. See Miranda v. United States, supra at 445-55.

However, a quite different situation arises when a criminal defendant is fully and most adequately advised of his constitutional rights, and then proceeds to admit his guilt, as did defendant in this case, even if such a confession occurs during a period of "unnecessary delay." There is no causal relationship between the period of delay and the confession, as there had always been in pre-Miranda cases.

Thus, appellant concludes that Miranda has altered the significance of the Morales decision. Having been advised of his rights, and the delay not having a direct causal connection with the rendering of the confession (other than providing the time period in which it was given), the statements should be admissible. Moreover, the time gap between the time of arrival at the federal building in San Diego and the time of arraignment was not great, being merely a matter of approximately two hours. Order, p. 5. Furthermore, some time was spent in processing defendant, R.T., p.74, a matter approved of in Morales.

Finally, approximately one hour was consumed by reason of defendant's concern about his bail. Id. at 80.



V.

CONCLUSION

The government respectfully submits that the order granting the motion to suppress the physical evidence, namely the one hundred thirty pounds of marihuana, be reversed, and that the order granting the motion to suppress the statements of guilt made by defendant be reversed.

Respectfully submitted,

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CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Joseph A. Milchen  
JOSEPH A. MILCHEN

